**LEE WAI FAY & ANOR**

**v.**

**LEE SENG EIN**

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
MOHD GHAZALI YUSOFF JCA
AUGUSTINE PAUL JCA
[CIVIL APPEAL NO: A-02-251-2002]
14 MAY 2005

***LAND LAW:*** *Indefeasibility of title and interests - Fraud - Onus of proof - Whether beyond reasonable doubt - Whether learned judge erred in applying balance of probabilities test - Whether court bound by Privy Council decision in Saminathan v. Pappa - National Land Code, s. 340(2)*

***EVIDENCE:*** *Standard of proof - Fraud alleged in civil case - Claim under s. 340(2) National Land Code - Whether beyond reasonable doubt or on a balance of probabilities*

This was an appeal by the defendants against the decision of the learned High Court judge ('the learned judge') allowing the plaintiff's claim for a declaration that the sale and purchase agreements regarding three pieces of land belonging to the plaintiff ('the said property'), and the subsequent transfer of the said property from the plaintiff to the 2nd and 3rd defendants, was null and void. It was not disputed that at the time of the filing of the claim, the registered owners of the said property were the 2nd and 3rd defendants. It was the plaintiff's case that the said property was improperly transferred and registered in the names of the 2nd and 3rd defendants. The learned judge, in his judgment, found that the plaintiff had proved fraud against the 2nd and 3rd defendants on a balance of probabilities. The 2nd and 3rd defendants appealed to this court, which had to determine whether the learned judge applied the correct standard of proof and whether the plaintiff had proved its claim accordingly.

**Held (allowing the appeal)**
**Per Mokhtar Sidin JCA:**

**[1]** Although there were uncertainties in respect of the test to be applied in view of the conflicting decisions in this court and in the Federal Court, this court was bound by the Privy Council decision of *Saminathan v. Pappa*. Since this claim by the plaintiff was under s. 340(2) of the National Land Code, the onus was on the plaintiff to prove fraud beyond reasonable doubt and not on a balance of probabilities. The present appeal was quite similar to the above case as the issue in both cases was whether the plaintiff had knowledge when he signed the sale and purchase agreements. In both cases, the plaintiff had also signed the acknowledgements of receiving the purchase price. The only difference in the present appeal was that the sale and purchase agreements were more elaborate. The above case made it clear that the fraud committed should be by the new registered owner and not by anyone else. In the present appeal, it was for the plaintiff to prove the fraud committed by the 2nd and 3rd defendants in registering their names on the said property. The learned judge, in applying the on a balance of probabilities test to prove fraud, had committed an error. On this ground alone, the appeal should be allowed. (p 418 c-d, g)

**[2]** The learned judge should have, in applying the balance of probabilities test, viewed the evidence in totality instead of finding fault with the evidence of one side and concluding that fraud had been committed. On the facts and upon a thorough perusal of the grounds in support of the learned judge's finding, the evidence of the defendants, even on a balance of probabilities, was more acceptable and probable than the evidence of the plaintiff. This court could not find fraud being proved by the plaintiff beyond reasonable doubt or even on a balance of probabilities. (pp 428 c, 429 h & 430 a)

*[Order of learned judge set aside.]*

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan oleh defendan terhadap keputusan yang arif hakim Mahkamah Tinggi ('yang arif hakim') kerana membenarkan permohonan plaintif untuk deklarasi bahawa perjanjian jual beli berkaitan tiga keping tanah plaintif ('hartanah tersebut'), dan pindahmilik hartanah tersebut kemudiannya dari plaintif kepada defendan-defendan kedua dan ketiga, adalah tak sah dan batal. Tidak dinafikan bahawa sewaktu pemfailan tuntutan, pemilik berdaftar hartanah tersebut adalah defendan kedua dan ketiga. Adalah menjadi kes plaintif bahawa hartanah tersebut telah dipindahmilik kepada dan didaftarkan atas nama

defendan kedua dan ketiga dengan secara yang tidak wajar. Yang arif hakim, dalam keputusannya, mendapati bahawa plaintif telah membuktikan fraud terhadap defendan kedua dan ketiga atas imbangan kebarangkalian. Defendan kedua dan ketiga merayu ke mahkamah ini, yang perlu memutuskan sama ada yang arif hakim telah menggunapakai beban bukti yang betul dan sama ada plaintif telah membuktikan tuntutan beliau dengan secukupnya.

**Diputuskan (membenarkan rayuan)**
**Oleh Mokhtar Sidin HMR:**

**[1]** Walaupun wujud ketidakpastian berhubung ujian yang harus digunakan ekoran keputusan-keputusan bercanggah mahkamah ini dan Mahkamah Persekutuan, mahkamah ini terikat dengan keputusan Majlis Privi dalam *Saminathan v. Pappa.* Oleh kerana tuntutan plaintif di sini adalah di bawah s. 340(2) Kanun Tanah Negara, beban adalah atas plaintif untuk membuktikan fraud di luar keraguan munasabah dan bukan atas imbangan kebarangkalian. Rayuan semasa agak serupa dengan kes di atas kerana isunya adalah sama iaitu sama ada plaintif mempunyai pengetahuan ketika menandatangani perjanjian jual beli. Dalam kedua-dua kes, plaintif telah juga menandatangani pengakuan penerimaan harga belian. Yang berbeza hanyalah bahawa perjanjian jual beli dalam kes semasa adalah lebih terperinci. Kes di atas menunjukkan dengan jelas bahawa fraud yang dilakukan hendaklah dilakukan oleh tuan punya berdaftar dan tidak oleh lain-lain orang. Dalam rayuan semasa, menjadi tugas plaintif untuk membuktikan fraud oleh defendan kedua dan ketiga dalam mendaftarkan nama-nama mereka atas hartanah tersebut. Yang arif hakim, dalam memakai ujian imbangan kebarangkalian untuk membuktikan fraud di sini, telah melakukan kesilapan. Atas alasan ini sahaja, rayuan ini harus dibenarkan.

**[2]** Yang arif hakim, dalam memakai ujian imbangan kebarangkalian, sepatutnya melihat kepada keterangan secara keseluruhan, dan tidak mencari kesalahan pada keterangan suatu pihak lalu merumuskan bahawa fraud telah dilakukan. Meneliti fakta dan alasan-alasan yang diberikan oleh yang arif hakim bagi keputusannya, keterangan defendan-defendan, atas imbangan kebarangkalian, adalah lebih boleh diterima dan lebih mungkin berbanding keterangan plaintif. Mahkamah ini tidak mendapati bahawa fraud telah dibuktikan oleh plaintif di luar keraguan munasabah, mahupun atas imbangan kebarangkalian.

**Case(s) referred to:**
*Ang Hiok Seng v. Yim Yut Kiu [1997] 1 CLJ 497 FC* ***(refd)***
*Lau Kee Ko & Anor v. Paw Ngi Siu [1974] 1 MLJ 21* ***(refd)***
*Saminathan v. Pappa [1981] 1 MLJ 121* ***(foll)***

**Legislation referred to:**
National Land Code, s. 340(2)

*For the appellants - K Kirubakaran (Max Yong Boon Swee with him); M/s Kiru & Yong*
*For the respondent - Ranjit Singh (Su Keong Siew & Mah Kok Leong with him); M/s KS Su & Mah*

*[Appeal from High Court, Ipoh; Civil Suit No: MT2-357-1999]*

*[Editor's note: For a recent authority on the standard of proof to be applied when fraud is being alleged in a civil case, please see also the decision of the Federal Court in Yong Tim v. Hoo Kok Chong & Anor [2005] 3 CLJ 229.]*

*Reported by Suresh Nathan*

## JUDGMENT

**Mokhtar Sidin JCA:**

The plaintiff (the respondent in the present appeal) and the 1st defendant were partners in an enterprise named Sing Lian Keong Poultry Enterprises ("the enterprise") which commenced business in 1993. We will refer to the parties as they were in the High Court. The plaintiff claimed that at the outset business was good until 1998 when the enterprise suffered financial difficulties. To save the enterprise the plaintiff had discussions with the 1st defendant whereupon the plaintiff agreed to contribute RM180,000 to the enterprise. The plaintiff averred that the RM180,000 was to come from a loan to be secured by the plaintiff's titles to three pieces of land situated in the Mukim of Sitiawan, Perak ("the said property"), namely:

(i) EMR No. 7235, Lot No. 7978;

(ii) EMR No. 7193, Lot No. 7983; and

(iii) EMR No. 7272, Lot No. 7957.

The plaintiff claimed that the loan was to be repaid by 50 monthly instalments of RM3,600 and between 14 May 1998 and 13 March 1999 he had repaid an amount of RM37,200. It is his claim that sometime in March 1998, on the request of the 1st defendant, he went to the office of Messrs. Ling Yoke Hooi & Co. at No. 87B Jalan Haji Salleh, Off Jalan Sentul, 51100 Kuala Lumpur,

a firm of solicitors, to execute some documents in respect of the loan. Subsequently, he repaid the loan by regular instalments whenever the 1st defendant visited his office to collect the repayments.

Sometime in June 1999, he was informed by his brother that the 3rd defendant was felling some trees on Lot No. 7978 of the said property. He then confronted the 3rd defendant and the tree felling was stopped. Sometime at the end of June 1999, he received a letter from Messrs. Sri Ling & Associates, a firm of solicitors, asking him to settle the sum of RM6,600 being assessment of real property gains tax on the disposal of the said property. This was told to him when he met the solicitors. He was informed by the solicitors that the said property had been sold to the 2nd and 3rd defendants.

It is the plaintiff's case that the said property was improperly transferred and registered in the names of the 2nd and 3rd defendants. He claimed that he did not know that the documents he executed in the office of Messrs. Ling Yoke Hooi & Co. were the sale and purchase agreements which he thought to be loan documents. He further claimed that he was deceived into executing those documents and as such the transfer and the registration of the said property into the names of the 2nd and 3rd defendants were wrongful, unlawful and thus null and void and/or invalid.

Alternatively, the plaintiff claimed that the sale and purchase agreements were null and void and also invalid on the ground that he did not receive any consideration. Although he had demanded for the said property to be re-transferred to him, the defendants failed, refused and/or neglected to do the same. The plaintiff has prayed for an order that the sale and purchase agreements and the transfer of the said property to the 2nd and 3rd defendants be declared null and void.

In their statement of defence, the 1st defendant admitted that the plaintiff was one of the three partners of the enterprise. The three partners were the 1st defendant, the plaintiff and a third person. The defendants in their statement of defence claimed that the enterprise was doing good business and making profits, but then faced financial difficulties due to the plaintiff's action in taking goods, namely poultry, from the enterprise without paying for them. At the material time, the plaintiff owed the enterprise a substantial sum of money. The 1st defendant had requested the plaintiff to pay the amount owing. As a result the plaintiff handed the title deeds of the said property to the 1st defendant asking him to look for buyers. The 1st defendant succeeded in selling the said property to the 2nd and 3rd defendants for a total consideration of RM180,000. As a result of that the 1st defendant requested the plaintiff to go to the office of Messrs. Ling Yoke Hooi & Co. to execute the sale and

purchase agreements and the transfer forms which the plaintiff complied. It is the 1st defendant's case that the said amount of RM180,000 was insufficient to settle the amount owed by the plaintiff to the enterprise and that the said sum of RM37,200 which he collected from the plaintiff were additional payments by the plaintiff to settle the amount he owed the enterprise. The defendants averred that the plaintiff knew that the documents he signed were the sale and purchase agreements and transfer forms relating to the said property. These documents were also explained to the plaintiff by the solicitor.

The 3rd defendant denied that he had cut down the rubber trees on Lot No. 7978 of the said property. He insisted that Lot No. 7978 belonged to him as at the material time he was the registered owner. It is also the 2nd and 3rd defendants' case that they had purchased the said property and had paid the full purchase price of RM180,000 to the plaintiff. The 1st defendant was only an intermediary in the transaction and the whole transaction was carried out in the solicitors' office of Messrs. Sri Ling & Associates in Ipoh where the 2nd and 3rd defendants executed all the documents in respect of the transaction whilst the plaintiff executed the documents at the legal firm of Messrs. Ling Yoke Hooi & Co. in Kuala Lumpur.

The plaintiff had also alleged that the defendants have fraudulently deprived him of the said property. He had prayed for the following remedies:

> (a) A declaration that the Sale and Purchase Agreements dated 27.3.1998 and the transfer of the said lands from the Plaintiff to the Second and Third Defendant is null and void and/or invalid;
>
> (b) The Second and Third Defendant do forthwith execute all the transfer documents to transfer the said lands to the Plaintiff, and in event of default, the Senior Assistant Registrar of the High Court is hereby authorized to execute all the transfer forms to effect the transfer of the said lands to the Plaintiff;

It is not disputed that at the time when the action was filed, the registered owners of the said property were the 2nd defendant (two lots) and the 3rd defendant (one lot). It is the plaintiff's case that the said property was his but because of the fraud committed by the three defendants, the same have now been registered in the names of the 2nd and 3rd defendants.

The learned judge in the court below allowed the plaintiff's claim and, *inter alia*, ordered that the said property be re-registered and in so ordering said:

> As provided under section 340(2)(a) NLC the title obtained by the 2nd and 3rd defendants shall not be indefeasible under the circumstances of this case. Accordingly I allow the first and second prayers stated in the Statement of Claim.

The 2nd and 3rd defendants appealed to this court. Before us, the first issue raised by the defendants is whether the learned judge was right in applying the burden of proof. In his decision, the learned judge held that the burden of proof on fraud is on a balance of probabilities and not beyond reasonable doubt and in support of this he cited the case of *Ang Hiok Seng @ Ang Yeok Seng v. Yim Yut Kiu* [1997] 1 CLJ 497. In his judgment the learned judge stated as follows:

> Principles of law to apply
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> Whether fraud exist is a question of fact, to be decided upon the circumstances of each particular case. Decided cases are only illustrative of fraud. Fraud must mean 'actual fraud, i.e. dishonesty of some sort' for which the registered proprietor is a party or privy. **'Fraud is the same in all courts … 'fraud' … implies a willful act, on the part of one, whereby another is sought to be deprived, by unjustifiable means, of what he is entitled** … Thus is *Waimiha Sawmill Co Ltd v. Waione Timber Co Ltd* [1926] AC 101 @ 106, it is said that 'if the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent …' – per Raja Azlan Shah (as his Royal Highness then was) in *P.J.T.V. Denson (M) Sdn Bhd v. Roxy (M) Sdn Bhd* [1980] 2 MLJ 136 @ 138.
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> And it is trite law that who ever makes the allegation must prove his case. **Where fraud is alleged is of a civil nature, as in this case, then the burden of proof is on the balance of probability – see the case of *Ang Hiok Seng @ Ang Yeok Seng v. Yim Yut Kiu* [1997] 2 MLJ 45.** (emphasis added).

We have gone through the record and the judgment and it is clear to us that the claim by the plaintiff is under s. 340(2) of the National Land Code ("NLC"). We are of the view that the learned judge had committed a grave error in applying the test of on a balance of probabilities instead of beyond reasonable doubt. Reading the judgment of the learned judge we found that he had misinterpreted the decision and the test in *Ang Hiok Seng @ Ang Yeok Seng.*

In *Ang Hiok Seng @ Ang Yeok Seng*, the Federal Court held that whether the allegation of fraud in civil proceedings concern criminal fraud such as conspiring to defraud, misappropriation of money or criminal breach of trust, it is settled law that the burden of proof is the criminal standard of proof beyond reasonable doubt and not on a balance of probabilities. An allegation of criminal fraud in civil or criminal proceedings cannot be based merely on suspicion or speculation. However, where the allegation of fraud is entirely founded on civil fraud and not on criminal conduct or offence, the burden to apply is on a balance of probabilities. Mohd Azmi FCJ (as he then was), in delivering the judgment of the court said:

Counsel for the appellant has referred to us authorities which with few exceptions seem to establish the proposition that the criminal burden is applicable to every allegation of fraud, but it must be noted that the majority of the leading authorities on the subject were dealing with criminal fraud in civil proceedings. The first authority is Lord Atkin's judgment in *ALN Narayanan Chettyar & Anor v. Official Assignee High Court Rangoon* AIR [1941] PC 93, where the Privy Council held that fraud, like any other charge of a criminal offence whether made in civil or criminal proceedings, must be established beyond reasonable doubt. A finding as to fraud cannot be based on suspicion and conjecture. In that case, the evidence was voluminous and consisted in large part on entries in account books. The fraud alleged by the plaintiff was that the sale of certain property was fictitious as a result of an alleged conspiracy between one Mr. Kasi and Mr. Subbaya to defraud the plaintiff's firm. There was difficulty in the evidence to ascertain the nature of the conspiracy. It was mainly for this reason that the Privy Council agreed with the appellate court that the finding of fraud by the subordinate court was based on mere suspicion arising from entries made in the account books.

The second authority is another Privy Council case, *Hansraj Gupta & Ors v. Dehra Dun Mussoorie Electric Tramway Co Ltd* AIR [1940] PC 98, where it was held the party alleging fraud is bound to establish it by cogent evidence and suspicion cannot be accepted as proof. Unless therefore the proved circumstances are incompatible with the hypothesis of the person charged with fraud having acted in good faith, they cannot be accepted as affording sufficient proof of fraud. The facts of the case again involved complicated evidence arising from the claim of a company, through its liquidators, of a sum of money against the defendants on the ground of fraudulent conspiracy of one Mr. Raghumal and his agent Mr. Lala Mela Ram in the misappropriation of the sum claimed. Since there was evidence that they were working in good faith, the evidence was insufficient to prove fraud.

The third authority is by our (then) Supreme Court in the case of *M Ratnavale v. S Lourdenadin* [1988] 2 MLJ 371, which was also a case involving a criminal conspiracy to defraud under the National Land Code 1965. *It was held that the criminal standard was required to prove fraud; and suspicion, however grave, is not proof for the purpose of defeating the indefeasibility of title under s. 340(2) of the National Land Code 1965.*

Other cases cited included the Privy Council case of *Saminathan v. Pappa* [1981] 1 MLJ 121 where at pp 123 – 124 Suffian LP in the Federal Court cited *Narayanan Chettyar* for *the proposition that the defendant must prove fraud not on a balance of probabilities but beyond reasonable doubt for the purpose of proving the plaintiff's name as registered owner under s. 340 of the National Land Code 1965.* On the evidence, the Federal Court found no evidence of fraud at all because, in the first place, it was the Ruler in Council who had rejected the defendant's application to have the land transferred to him and subsequently, on the plaintiff's application, the Ruler in Council consented to transfer the land to her. At p 124, Suffian LP said:

> As regards the plaintiff's alleged fraud in misrepresenting to the Ruler in Council that the defendant was in India when he was in fact in Malaysia and that Palaniandy and the defendant were no longer interested in the land, as already stated, the burden is on the defendant to prove the plaintiff's alleged fraud beyond reasonable doubt. Has he done so? The only evidence of fraud came from the Collector who appeared in the witness box and who also handed over to the court the relevant file from his office. But with due respect I do not think that that was enough. There was no evidence that he was a member of the Executive Council that advised the Ruler on the defendant's and plaintiff's applications. It is true that the paper submitted to Executive Council on the plaintiff's application (p 159 of the appeal record) mentioned only the two PAs and did not mention the sale agreement P2, but there was no evidence from any member or the Secretary of the Council or in what way the contents of the paper or omissions from it influenced their decision one way or another, it being quite well-known that even if all documents were in order the Ruler in Council could still refuse his consent to an application of this kind, decisions on which being made on grounds of public policy, not on considerations of law. I would therefore respectfully disagree with the learned judge that the defendant has satisfied the court beyond reasonable doubt that the plaintiff has been guilty of fraud.

*The criminal standard, ie proof beyond reasonable doubt, was also applied by the Privy Council in Datuk Jagindar Singh & Ors v. Tara Rajaratnam* [1986] 1 MLJ 105. *There the fraud was based on criminal breach of trust and undue influence in the transfer by the plaintiff's land.* At p 110, Lord Keith of Kinkel held:

> Nevertheless he, and also the Federal Court, correctly directed themselves that the standard of proof of fraud in civil proceedings was the criminal standard of proof beyond reasonable doubt.

Again, in *Chu Choon Moi v. Ngan Sew Tin* [1986] 1 MLJ 34, the Supreme Court held at p 38:

> We agree that fraud whether made in civil or criminal proceedings must be proved beyond reasonable doubt and cannot be based on suspicion and conjecture (*Narayanan v. Official Assignee Rangoon* AIR [1941] PC 93; *Saminathan v. Pappa* [1981] 1 MLJ 121). Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The degree of proof need not reach certainty but it must carry a high degree of probability. What it means is that the evidence adduced is such that the court believes its existence or a prudent man considers its existence probable in the circumstances of the particular cases. If such proof extends only to a possibility but not in the least a probability, then it falls short of proving beyond reasonable doubt (see 'proved' at s. 3 of the Evidence Act 1950 and *Liew Kaling & Ors v. PP* [1960] MLJ 306).

> In the present appeal before us, the facts and circumstances of the case in relation to the part played by the respondent point to the probability that any prudent man would under circumstances accept it to be fraudulent.

Again, in *Eastern & Oriental Hotel (1951) Sdn Bhd v. Ellarious George Fernandez & Anor* [1989] 1 MLJ 35 at p 38, the Supreme Court reaffirmed – following *Saminathan v. Pappa* – that onus of proof of fraud in this country is proof beyond reasonable doubt.

However, for forgery in bank charges, the Supreme Court in applying the civil burden of proof held in *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31, following *Sykt Islamiyah v. Bank Bumiputra Malaysia Bhd* [1988] 3 MLJ 218:

> Another important matter has been raised by the appellant in connection with the issue of forgery. It was argued for the appellant both in the court below and before us that the standard of proof required in cases such as this should be beyond a reasonable doubt and *Sykt Perkapalan Timor v. United Malayan Banking Corp Bhd* [1982] 2 MLJ 193 was cited in support. We have examined this decision with some care but we are unable to agree with the appellant's counsel that it is authority for the proposition that is put forward for the appellant. In our judgment, a customer who alleges that his banker honoured forged cheques drawn on his account need only establish the charge of forgery on a balance of probabilities and in this respect, we agree with the statement of the law by Gunn Chit Tuan J (as he then was) in *Sykt Islamiyah v. Bank Bumiputra (Malaysia) Bhd* where at p 220 the learned judge said:
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> > In this case although it would appear that there was no or insufficient evidence to prove beyond reasonable doubt for purposes of criminal proceedings that the signatures on the cheques concerned were forged by the said Awang @ Che Mah bin Che Lob, yet I was satisfied that there was evidence adduced to prove on a balance of probabilities in this case that the signatures on the cheques were not those of the plaintiff's but were forged or placed thereon without the plaintiff's authority and were therefore wholly inoperative.
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> We are therefore of the opinion that the learned judge did not misdirect himself on the measure of proof that is required to 'bring home a case of forgery on the facts of such a case as the one before us.

From the wide definition of 'fraud' under s. 17 of the Contracts Act 1950 as well as leading authorities on the subject, where the allegation of fraud in civil proceedings concerns criminal fraud such as conspiracy to defraud or misappropriation of money or criminal breach of trust, it is settled law that the burden of proof is the criminal standard of proof beyond reasonable doubt, and not on the balance of probabilities. It is now well established that an allegation of criminal fraud in civil or criminal proceedings cannot merely be based on suspicion or speculation. In allowing the appeal in *Lau Kee Ko & Anor v. Pau Ngi Siu*, the Federal Court reversed the judgment of the High Court on the finding of a civil fraud in a non-disclosure dispute wherein the plaintiff was led to think that he was contracting with the owner when in point of fact he was contracting with an agent. The fraud alleged was purely civil in nature and based on whether there was any personal consideration when the plaintiff entered into the contract, and on that basis the burden of proof was the civil burden. We agree with both counsel that to the extent that the general statement of the law in *Lau Kee Ko* is understood to mean a total rejection of the criminal burden in all cases of fraud, it is no longer good law. But where the allegation of fraud (as in the present case) is entirely founded on a civil fraud – and not based on a criminal conduct or offence – the civil burden is applicable.

From all the authorities cited before this court, it seems clear that fraud can be civil or criminal in any civil proceedings. Hence *Osborne's Concise Law Dictionary* (8th Ed) at p 152 defines fraud as follows:

> The obtaining of a material advantage by unfair or wrongful means; it involves obliquity. It involves the making of a false representation knowingly, or without belief in its truth, or recklessly. If the fraud causes injury, the deceived party may claim damages for the tort of deceit. A contract obtained by fraud is voidable at the option of the injured party. Conspiracy to defraud remains a common law offence, the mens rea of which has been defined as 'to cause the victim economic loss by depriving him of some property or right corporeal or incorporeal, to which he is or would or might become entitled', per Lord Diplock in *R v. Scott* [1975] AC 814. Certain other frauds are likewise criminal offences, eg under the Prevention of Fraud (Investments) Act 1958.

Indeed, our s. 17 of the Contracts Act 1950 recognizes the various shades of fraud by defining it as follows:

> 'Fraud' includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:
>
> (a) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;

(b) the active concealment of a fact by one having knowledge of belief of the fact;

(c) a promise made without any intention of performing it;

(d) any other act fitted to deceive; and

(e) any such act or omission as the law specially declares to be fraudulent.

Explanation – Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.

The definition of 'fraud', read in conjunction with the authorities, leads us to the conclusion that where the fraud alleged in civil proceedings is based on a criminal offence, the criminal burden of proof beyond reasonable doubt must be applied. But where the fraud alleged is purely civil in nature, there is no reason why the civil burden should not apply. (emphasis added).

In *Lau Kee Ko & Anor v. Paw Ngi Siu* [1974] 1 MLJ 21, the appellants entered into a written agreement with the respondent, a building contractor, to construct and complete terrace houses on land belonging to the son of the first appellant and the second appellant. The first appellant held a power of attorney from his son. The respondent did not complete the construction of the terrace houses within the time stipulated and the appellants formally terminated the agreement. Subsequently, the respondent served a writ on the appellants claiming $10,236 for work done and materials supplied or alternatively for damages for fraudulent misrepresentation and/or breach of contract. The appellants denied fraud and contended that the respondent knew that appellant No. 1 was holding a power of attorney on behalf of his son. They counterclaimed for the sum of $11,500 which they claimed they had paid to prospective purchasers of the houses. The learned trial judge held that fraud was established but did not make any finding with regard to the alternative claim for work done and materials supplied. He dismissed the counterclaim as he found that the appellants had failed to prove compensation. On appeal, the Federal Court held that when the respondent entered into the contract there was no evidence to show that he was misled to be contracting with the owner when in point of fact he was contracting with the agent. Therefore, on the facts, fraud had not been made out. Raja Azlan Shah J (as His Royal Highness then was) in delivering the judgment of the court, said at p. 23:

Assuming the facts arrived at by the learned judge are correct, is that enough to justify a finding of fraud? It is evident from the record that appellant No. 1 had entered into a contract in his own name without disclosing the existence or identity of the principal. In my mind the contract entered into by an agent in similar circumstances is valid. I say this because a power of attorney establishes the relationship of principal and agent as between the donor and done, and is therefore affected by the law applicable to the law of agency. Now the general law of agency is that when an agent describes himself in the agreement as the owner of a piece of land and signs it in his own name without qualification, he is *prima facie* deemed to be contracting personally and thus personally liable. His principal may also be liable. The third party has to elect to sue both the principal and agent jointly or severally.

If that is the true effect of the law, is there anything to entitle the respondent to avoid a contract made with the appellants? Can it now be said that on those facts alone – those facts relied on by the trial judge – there was fraud. *It is a wholesome rule of our law that where a plaintiff alleges fraud, he must do more than establish the allegation on the basis of probabilities. While the degree of certainty applicable to a criminal case is not required, there must, in order to succeed, be a very high degree of probability in the allegation.*

In my opinion what is important in a case like the present is whether consideration of the person with whom the respondent was contracting formed a material element of the contract. If the answer is "yes" then, non-disclosure of the undisclosed principal annuls the contract. That may amount to fraud. The law is laid down by Fry J (as he then was) in *Smith v. Wheatcroft* where he quotes and approves Pothier Traite des Obligations where he says:

> Does error in regard to the person with whom I contract destroy the consent and annul the agreement? I think that this question ought to be decided by a distinction. Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent, and consequently annuls the contract … On the contrary, when the consideration of the person with whom I thought I was contracting does not enter at all into the contract, and I should have been equally willing to make the contract with any person whatever as with him with whom I thought I was contracting, the contract ought to stand.

That passage has been applied to cases analogous to the present *viz*, by North J in *Nash v. Dix;* by Smith LJ in *Gordon v. Street* and by McCardie J in *Said v. Butt*.

In the present case the misrepresentation alleged is that the respondent was led to think that he was contracting with the owner when in point of fact he was contracting with the agent. Is that a material element of the contract? I ask myself here whether the respondent has shown that any personal considerations entered into the contract? Has he shown the court that he would have been unwilling to enter into the contract in the same terms with anybody else. I say

> distinctly that he has failed to produce such an effect on my mind. In my opinion he did not care a straw who he was contracting with, and whether a contract has been made in the name of the appellant No. 1 or of the principal, would not have made the slightest difference to him. Under those circumstances it is all but certain that no personal consideration had entered as an element in the formation of the contract. Speaking for myself, I very gravely doubt whether all those matters, when added together, in the circumstances of this case, amounted to fraud. To put at its highest, the allegation of fraud was of the most tenuous kind. (emphasis added).

The present appeal is a claim under s. 340(2)(a) of the NLC and as we have stated earlier the onus is on the plaintiff to prove fraud beyond reasonable doubt and not on a balance of probabilities. The leading authority is the case of *Saminathan v. Pappa* [1981] 1 MLJ 121 which was a Privy Council decision. In that case a piece of land had been transferred to the respondent. The land belonged to one Palaniandy who had appointed the appellant as his attorney in respect of his property. The appellant acting as the duly constituted attorney of Palaniandy, gave the respondent an irrevocable letter of attorney purporting to authorize the respondent to transfer the said land to herself. Subsequently, the appellant and the respondent entered into an agreement to sell the land to the respondent. The land was then transferred and registered in the respondent's name on the strength of the two powers of attorney and a statutory declaration. In the statutory declaration the respondent declared that the appellant and Palaniandy were in India. Notwithstanding the transfer of the registered title to the respondent, the appellant continued to occupy and cultivate the land. The respondent commenced proceedings for trespass against the appellant. In his defence the appellant counterclaimed that the respondent had transferred the land into her name fraudulently and by means of a void instrument. The learned trial judge found in favour of the appellant. On appeal, the Federal Court allowed the appeal and held that the respondent was the registered proprietor of the land, her title was indefeasible and the burden was on the appellant to prove fraud or misrepresentation to which the respondent was a party or that the registration of the respondent as proprietor was obtained by means of an insufficient and void instrument. The Federal Court further held that the appellant had failed to prove the allegation of fraud beyond reasonable doubt. Suffian LP (as he then was) in delivering the judgment of the Federal Court said at pp. 122-125:

> Now as to the law, it is clear from section 340 of the National Land Code that *the plaintiff's title to the land in dispute is indefeasible, but it may be defeated in case of fraud or misrepresentation to which she was a party or where registration was obtained by means of an insufficient or void instrument.*

Section 340 of the National Land Code reads as follows:

340(1) The title or interest of any person or body for the time being registered as proprietor of any land … shall, subject to the following provisions of this section, be indefeasible.

(2) The title or interest of any such person or body shall not be indefeasible:

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) …

(3) …

*As the plaintiff's name is on the register and the defendant wanted it removed, in my judgment the burden is on the defendant to prove fraud or misrepresentation to which the plaintiff was a party, or that the registration of the plaintiff as proprietor was obtained by means of an insufficient and void instrument.*

*As regards fraud, the defendant must prove it not on a balance of probabilities but beyond reasonable doubt: see the Privy Council case of Narayanan.*

The learned trial judge held that the plaintiff was guilty of fraud or misrepresentation within the meaning of section 340 and that therefore her title was defeasible. He held that the Ruler in Council consented to the land being transferred to the plaintiff on the strength of the two P.As, that the plaintiff had falsely declared that the defendant was in India (in fact he was then in Malaysia) and that the plaintiff had misled the State authorities into thinking that both Palaniandy and defendant agreed to the transfer and were no longer interested in the land.

The learned trial judge found that the second P.A. was executed by the defendant on the understanding that the plaintiff would look after the defendant who was then seriously ill and would also look after his wife who was then going blind, that the plaintiff should transfer the land to herself only after the defendant's death and that the plaintiff knew all along that the power was given to her not for the purpose of selling the property to her.

The learned trial judge also found that by granting the second P.A. to the plaintiff the defendant had exceeded the authority granted to him by Palaniandy under the first P.A. and that therefore the transfer of Palaniandy's land by the plaintiff to herself was obtained by means of an insufficient or void instrument within the meaning of section 340(2)(b) of the National Land Code, and that accordingly the transfer was void.

As regards the plaintiff's claim that the land had been sold to her by the defendant by virtue of Exhibit P2, the learned trial judge held that the defendant executed the sale agreement, that the defendant had agreed to sell the land to the plaintiff, that neither fraud nor undue influence had been pleaded by the defendant as far as that exhibit was concerned, that it was therefore reasonable to infer that the defendant knew that the document was in respect of sale of the land. But the learned trial judge found as a fact that of the purchase price of $7,500 the plaintiff had paid only a sum of $3,200 and a further sum of $600, making a total of $3,800, and that the plaintiff had not paid a total sum of $3,700.

Accordingly, the learned trial judge dismissed the plaintiff's claim and allowed the defendant's counterclaim. He granted in favour of the defendant:

(a) a declaration that the defendant's principal, Palaniandy, has been and is still the proprietor and registered owner of the land;

(b) a declaration that the second P.A. was null and void as far as it affected the land;

(c) an injunction restraining the plaintiff or her agents or servants or any person or persons claiming by or through her from interfering with the defendant's rights over the land in his capacity as Palaniandy's attorney;

….

The plaintiff appeals to us.

….

My conclusion is as follows.

The first P.A. given by Palaniandy in 1952 to the defendant gives him power among other things to do the following:

> 9. To sell to any person all or any of my lands … now belonging to me … and for the purpose to sign and to execute all transfers and other instruments necessary.

It is plain that under that clause the defendant had power to sell Palaniandy's land and for that purpose to sign and execute all transfers and other necessary instruments. In my opinion this includes power to sell the land in question to the plaintiff and to execute an irrevocable P.A. in her favour; this P.A. had to be irrevocable because there was at that stage no registered title to the land. In my judgment, when granting the second P.A. to the plaintiff and executing the sale agreement P2, the defendant was acting in accordance with the authority given to him by Palaniandy in the first P.A.

This second P.A. was on a printed form. It contains a typed acknowledgment by the defendant that he had received a consideration of $10. The solicitor who prepared this P.A. explained that consideration was inserted so that the power would survive the defendant's death. The P.A. also had typed in an additional clause (No. 24) by which the defendant authorized the plaintiff "to convey unto herself (the disputed land) … absolutely". The significance of this clause was explained by the solicitor to the defendant.

It is true that the evidence of the solicitor which the learned judge accepted was that when executing the second P.A. the defendant did not intend to sell the land and that it was the intention of the plaintiff and defendant that the land was not to be transferred by the plaintiff to herself until after the defendant's death. This arrangement was made on the understanding that the plaintiff was to look after the defendant's wife and son after his death.

But with respect, the parties' intention in 1962 was superseded by their intention on August 10, 1967, when they executed the sale agreement by which the defendant clearly agreed to sell the land to the plaintiff on certain conditions and in my opinion the validity of the registration of the plaintiff as proprietor has to be viewed in the light of this agreement also. If this agreement gave the plaintiff a good title, then in my opinion her title is indefeasible.

The next question that arises is this: has the plaintiff complied with the conditions of the sale agreement? More specifically, did the plaintiff pay the balance of the purchase price by the due date?

The learned judge was in error in finding that the plaintiff did not pay a total of $3,700, when the defence pleads that if there had been a sale which was not admitted, only a lesser sum ($2,300) remained outstanding.

Did the plaintiff pay this sum ($2,300) by the due date given by P2 as October 31, 1967?

The learned judge found that a sum of $600 was paid by the plaintiff to the defendant on or before that date, so that the only question that remains is whether or not the plaintiff did pay the defendant $1,700 by that date.

As to this the plaintiff said that she did pay though late and the defendant said that the plaintiff never paid at all. PW4 Mr. Vallipuram, a clerk at the Land Office, Kuala Selangor, and President of the Indian Temple, and an independent witness, however, was quite definite that the plaintiff did pay the defendant the $1,700 on January 25, 1968.

The learned trial judge however disbelieved PW4's evidence that the plaintiff paid the defendant $1,700 on January 25, 1968. If that had been the only evidence on this point, then it would not have been open to us to interfere with the judge's conclusion, but that was not the only evidence. There is also the written evidence of the endorsement at the back of the I.O.U. (Exhibit P7) executed by the defendant that day, which reads:

> I (defendant) being the holder of (the first P.A.) has this day extended the power given to me by Palaniandy to (the plaintiff) on (second P.A.) which is IRREVOCABLE. This power is in respect of (the land in question). I (defendant) has this day sold the abovementioned land to (the plaintiff). She may have the land transferred in her name and I have no claim over this land. In the event the authority do not approve the transfer then the whole sum including interest thereto is payable by me (defendant).

In my judgment it would have been open to the learned judge to infer from the language of P7 that the plaintiff had paid the defendant $1,700; otherwise the defendant would not have agreed to refund it if the Ruler in Council refused to consent to the transfer of the land.

It is to be observed that the defendant affixed his thumb print impression on both sides of the I.O.U., and that he had the benefit of the advice and assistance of his son Muniandy who knew English.

I respectfully agree with learned counsel for the plaintiff before us that in view of this the learned judge should have found that a sum of $1,700 was paid by the plaintiff to the defendant on the day P7 was executed, namely January 25, 1968.

But the sale agreement provided that the balance of the purchase price was to be paid on or before October 31, 1967, and final payment was not made until January 25, 1968. Did late payment matter?

It is to be observed that the sale agreement did not contain any time clause and that time was not therefore of the essence of the contract. Even assuming that time was of the essence of the contract, the fact that the plaintiff and the defendant mutually varied the agreement by the plaintiff tendering and the respondent accepting the sum of $1,700 on a date subsequent to the date by which the amount should under the agreement have been paid (October 31, 1967) is in my judgment sufficient to estop the defendant from complaining that the plaintiff had not paid the money in due time.

As regards the plaintiff's alleged fraud in misrepresenting to the Ruler in Council that the defendant was in India when he was in fact in Malaysia and that Palaniandy and the defendant were no longer interested in the land, as already stated the burden is on the defendant to prove the plaintiff's alleged fraud beyond reasonable doubt. Has he done so? The only evidence of fraud came from the Collector who appeared in the witness box and who also handed over to the court the relevant file from his office. But with due respect I do not think that that was enough. There was no evidence that he was a member of the Executive Council that advised the Ruler on the defendant's and plaintiff's applications. It is true that the paper submitted to Executive Council on the plaintiff's application (page 159 of the appeal record) mentioned only the two P.As. and did not mention the sale agreement P2, but there was no evidence from any member or the Secretary of the Council or in what way the

contents of the paper or omissions from it influenced their decision one way or another, it being quite well-known that even if all documents were in order the Ruler in Council could still refuse his consent to an application of this kind, decisions on which being made on grounds of public policy, not on considerations of law. I would therefore respectfully disagree with the learned judge that the defendant has satisfied the court beyond reasonable doubt that the plaintiff has been guilty of fraud.

It would appear from the correspondence between the plaintiff and the Land Office, especially the Collector's letter dated February 2, 1970, that the Collector was mainly interested in finding out whether or not the two P.As. in question were still valid at the time of the application.

During the course of arguments in this appeal it was stated on behalf of the defendant that the plaintiff applied for the Ruler in Council's consent before she had paid the full purchase price and that this showed fraud on her part. With respect I do not think that there is any merit in this argument, in the absence of any evidence whether or not this factor influenced Executive Council's decision one way or another.

It should be emphasized that there is no evidence in this case that Executive Council acted in any way like a registering authority to whom is presented a memorandum of transfer for registration. A registering authority will not register such a document unless it is sure that all the formalities have been observed, but it is quite possible for Executive Council to consent to a transfer which may be agreed only in the future or to a transfer for which there is little or no consideration or even to refuse to consent to a transfer the instruments of which are all fit for registration. (emphasis added).

The defendant being dissatisfied with that decision appealed to the Privy Council which dismissed the appeal and upheld the decision of the Federal Court. Lord Diplock (delivering the judgment of the Board) stated at pp. 125-127:

The Palaniandy P.A., in addition to authorizing Saminathan to sell the disputed land, gave him express power:

> To substitute and appoint from time to time one or more attorney or attorneys with the same or more limited powers and such substitute or substitutes at pleasure to remove and another or others to appoint.

Five years later on July 9, 1962 Saminathan, who was apparently ill at the time, himself granted to Miss Pappa a general power of attorney ("the second P.A.") in substantially similar terms. It was expressed to be irrevocable and contained no reference to the Palaniandy P.A.; but it included an express provision in Clause 24 empowering Miss Pappa:

To convey unto herself (grantee) the land held under A.A.814/505/B and 79/757B Sekinchang Kuala Selangor" (i.e. the disputed land) "absolutely".

There was no evidence that by July 9, 1962 Saminathan had agreed to sell the disputed land to Miss Pappa; and their Lordships agree that the Palaniandy P.A. did not empower Saminathan to authorise Miss Pappa to transfer to herself the title to the disputed land of which Palaniandy was still the registered proprietor except pursuant to an agreement for sale under which Miss Pappa was herself the purchaser.

This express power to transfer to herself the registered title to the disputed land, although it was granted at a time when no sale agreement was yet in existence, was not exercised until after Saminathan had entered into the agreement to sell the disputed land to Miss Pappa of August 10, 1967 ("the sale agreement") to which reference has already been made. The sale agreement contained express provision to the effect that the purchaser should obtain completion by using the powers vested in her by the second P.A. This she did on July 9, 1970, her registration being obtained by production of the Palaniandy P.A. and the second P.A.

Whatever might have been the position under section 340(2)(b) as regards the sufficiency of the second P.A. if the power to transfer the disputed land which it purported to confer upon Miss Pappa had been exercised by her before the sale agreement had been made, any defect in her power to execute the transfer was cured by the coming into existence of the sale agreement before the power was exercised. Their Lordships agree with the Federal Court that Azmi J's holding to the contrary was wrong. The learned judge does not appear to have appreciated the relevance of the sale agreement to the validity of the transfer.

Their Lordships accordingly now turn to the three findings of fraud on which the learned judge relied as defeating the registered title of Miss Pappa under section 340(2)(a). Only one allegation of fraud was made in Saminathan's pleading *viz.* that Miss Pappa had misrepresented to the Collector of Land Revenue that Saminathan desired the transfer of the title of the disputed land to her. There is a sentence in the trial judge's judgment which suggests that he found this allegation proved but counsel for Saminathan has been unable to point to even a shred of evidence that any such representation, whether true or false, was ever made to the Collector. The onus of proof of fraud in Malaysia is proof beyond reasonable doubt. In the circumstances the Federal Court were clearly entitled, if not bound, to reject, as they did, the judge's finding on this matter.

There were, however, two other findings by the judge of fraud that had not been pleaded. The title under which Palaniandy was registered as proprietor of the disputed land was subject to a condition that it should not be transferred without the consent of the Ruler in Council; and the first of the judge's two findings of unpleaded fraud was based on a statement in a Statutory Declaration

made by Miss Pappa on March 11, 1970, in support of her application for consent to and registration of the transfer. She there stated that Palaniandy and Saminathan were at that date "still living in India". This was accurate in stating that both were living, a matter of importance, since powers of attorney cease to be effective upon the grantor's death; but it was inaccurate in stating that Saminathan was then living in India; he was in fact living in Malaysia. There was no evidence that, when deciding to approve the transfer, either the Executive Council of the State or the Collector of Land Revenue, to whom the statutory declaration was sent, attached any importance to whether Saminathan was living in India or Malaysia, so long as he was still alive; nor was counsel for Saminathan able to suggest any reason why this particular piece of information would be relevant to a decision to approve or reject the transfer that appeared plausible to the members of the Federal Court, who are familiar with the way in which the system of registration of titles in Malaysia works in practice. If Saminathan was relying upon this misstatement as having induced the Executive Council to assent to the transfer it was for him first to plead it and then to prove it beyond reasonable doubt. Their Lordships agree with the Federal Court that this finding of fraud by the learned judge cannot stand.

The second finding of unpleaded fraud made by the learned judge, to which a considerable portion of his judgment was devoted, arose out of the sale agreement and the payment of the purchase price thereunder. The existence of the sale agreement was undisputed, but there was considerable conflict of oral evidence as to whether the whole of the purchase price had been paid before the date of registration of the transfer and if so when individual instalments of it had been paid. Such documentary evidence as there was supported Miss Pappa's claim that it had all been paid by July 9, 1970; but it was conceded that the second instalment had been paid some three months after the contract date, albeit more than two years before the transfer itself. An issue as to underpayment was raised upon the pleadings where it was relied on by Saminathan as a breach of condition; but the judge appears to have considered that if Miss Pappa relied upon the sale agreement as justifying her use of the second P.A. in order to effect the transfer to herself of the registered title to the disputed land, an onus lay upon her to prove that the purchase price thereunder had been paid in full and punctually and that no onus lay upon Saminathan to prove the contrary. In this, as the Federal Court pointed out, he was clearly wrong. The learned judge, although he referred to the conflicting evidence as to payment in considerable detail, was unable to reach any positive finding of fact. All he could do was to express his view that, on the evidence, Miss Pappa had not satisfied the onus of proving full and punctual payment. Her failure to satisfy this onus he treated as equivalent to actual proof of a breach of condition of the sale agreement despite the fact that time had not been made the essence of it, and he went on to hold that Miss Pappa was acting fraudulently in registering the transfer because she had not proved that she had by that date paid the full purchase price.

> The Federal Court rejected the learned judge's reasoning on this part of the case. They also considered that despite the conflict of oral evidence the documentary evidence was strong enough to justify them in making their own finding of fact that the purchase price had been paid in full before the transfer and had been paid punctually except as regards a sum of $1,700, part of the second instalment, which was paid three months late. Their Lordships, however, do not find it necessary to canvass the justification for that finding of fact by the Federal Court which the trial judge had refused to make. Miss Pappa's failure to pay the purchase price in full and punctually, even if proved beyond reasonable doubt, could not in law amount to fraud or entitle the unpaid vendor to defeat the registered proprietor's title under section 340(2)(a).

We are of the view that we are bound by the above decision. Though there are uncertainties in respect of the test to be applied in view of the conflicting decisions in this court and the Federal Court, we feel safe with the authority above which, from the highest court in this country, is still binding and the test to prove fraud is one of beyond reasonable doubt in respect of s. 340(2) of the NLC. We have noted that the present appeal is quite similar to the above case. The issue in both cases was whether the plaintiff had knowledge when he signed the sale and purchase agreements. In both cases the plaintiff had also signed the acknowledgments of receiving the purchase price. The only difference in the present appeal is that the sale and purchase agreements are more elaborate. In the above case there was a statutory declaration submitted by the purchaser to the Ruler in Council in getting its approval for the transfer and that statutory declaration was definitely false because the vendor was in Malaysia and not in India. The court in that case found that the statutory declaration did not influence the decision of the Ruler in Council and as such there was no fraud. In the present case the alleged false document as found by the learned judge was the lien holder's caveat which did not influence the transfer at all because the transfers were done on the strength of the agreements and the transfer forms.

The above case made it clear that the fraud committed should be by the new registered owner and not by anyone else. In the present appeal it is for the plaintiff to prove fraud committed by the 2nd and 3rd defendants in registering their names on the said property.

The learned judge in applying the test of on a balance of probabilities to prove fraud in the present appeal has committed an error. On this ground alone the appeal should be allowed.

As we have stated earlier, the learned judge in his judgment found that the plaintiff had proved fraud against the 2nd and 3rd defendants on a balance of probabilities. He listed seven grounds to support his finding. Let us now look into the seven grounds to see whether there is evidence to support his finding:

*1. First Ground*

The learned trial judge stated in his judgment as follows:

> 1. Firstly, lien holders caveats were entered against the said lands in April 1998 by the 2nd and 3rd defendants. This was made after the purported date of the sale and purchase agreements. I agree that though it is the normal practice to enter caveats over properties agreed to be purchased before the full purchase price is paid but such caveats are private caveats. Lien holder's caveats are inserted only where the documents of title were deposited as a security for a loan. Why then were these created in this case?
>
> DW6, the lawyer from M/s Sri Ling who was in charge of the transition, explained that his clerks had made a mistake over the type of caveat to be levied on the said lands. Instead of inserting private caveats, his staff had placed lien holder's caveats.
>
> But such explanation is unconvincing in the light of these disclosures:
>
> (a) DW6 professed to be well versed in the practice of conveyancing. By this he would have competent staff to assist him. And if his staff, which most probably would be the case, prepared the documents, he would have checked them before asking the 2nd and 3rd defendants as well as himself to sign. Under such circumstances how could such error not be discovered unless it they meant what they were intended for – security for a loan.
>
> (b) The creation of any form of caveats requires concentrated effort such as insertion and deletion to fill up the relevant forms specified under the National Land Code (NLC). Thus anyone completing a Form 19D of the NLC must have known that that such caveat was for a lien over the landed property for the purpose of securing a loan granted. Such words are explicitly stated in the form itself. This makes it difficult to comprehend how such error could have been happened in this case unless it actually meant for the purpose intended.
>
> (c) Though attestation under section 211 NLC is not required for the purpose of a lien holder's caveat yet there were two statutory declarations by the 2nd and 3rd defendants prepared. DW6 seized upon these to impress upon this Court that the contents of these declarations itself exposed the transactions were a sale, and not that of a loan. But the contents of this document created more doubts than correction. In the first paragraph of both these attestations the word

lien holder is again repeated despite the other paragraph referring it to a sale. But if it was a sale and entry of private caveats were intended there were no deposits for the purchase ever paid. But yet it is declared herein that such payments had been carried out giving effect and consideration for the placing of such caveats over the land. Such contradictions cast doubts on the type of transaction – that of a sale rather than a loan – as claimed by the defendants.

(d) If an error was made to lodge lien holder's caveats instead of private caveats over the said lands this would have been detected at the Land Office during presentation. For the registration of lien holder's caveats, as pointed out above, there is no necessity for the presentation of the attestations. But these were brought along to accompany Forms 19D. Such documents must have been rejected and when this occurred the mistake of the type of caveat to be inserted would have been discovered. Instead of withdrawing the presentation, DW6 proceeded with no correction made then or subsequently. This seems to indicate an intention to create the type of caveat meant in Form 19D NLC.

The evidence shows that it was the 1st defendant who suggested to the defendants to approach DW6 to prepare the sale and purchase agreements and the transfer forms because DW6 happened to be his nephew. All the defendants agreed and as a result, DW6 was asked to prepare all the documents. There is no evidence to show that the defendants have instructed DW6 to enter caveats in respect of the said property. This is understandable because the three defendants are laymen and would not know what the caveats are for and further would not know the difference between ordinary caveats and lien holder's caveats. It is not disputed that DW6 gave instructions to a member of his staff to lodge caveats on the said property. DW6 in his evidence said that the lien holder's caveats were prepared by his clerk and his clerk had mistakenly prepared the lien holder's caveats instead of the normal private caveats. The lien holder's caveats were then lodged at the land office on the said property. The learned judge took very a serious view of this mistake as can be seen from his grounds of decision. We noted that there is no evidence to show that DW6 at that time was a solicitor having vast experience in land matters. Apparently, DW6 was the only solicitor in the firm dealing in all kinds of matters and there was no evidence to show that the firm was an established one. We are of the view that even if the lien holder's caveats were mistakenly lodged, it would not be fatal to the defendants' case. Furthermore, the evidence clearly showed that the lien holder's caveats were not lodged on the instruction of the defendants. The evidence showed that the full purchase price had been paid when the caveats were lodged but the plaintiff had not signed the sale and purchase agreements and the transfer forms. It might have been because of that that DW6 lodged the lien holder's caveats.

Has the plaintiff been misled by the lien holder's caveats? We did not think so. The evidence showed that he discovered those caveats long after the transfers had been completed and the caveats had been removed. Under these circumstances we do not think it can be said that the 2nd and 3rd defendants have committed fraud or misrepresentation.

*2. Second Ground*

The learned judge stated the second ground as follows:

> 2. Secondly, I find it extraordinary for the 2nd defendant to purchase the two lots of the said lands without having even seen the property. This girl, who is only a clerk in S.S.K. Sdn Bhd earning a sum of RM1,200.00 per month, was able to amass such a substantial sum of RM120,000 in cash to pay for the purchase price. She said she relied entirely on the opinion of her father-in-law, DW5, the prime mover of this transaction to enter into this purchase. But DW5 was also the managing director of the company that supplied feeds to the firm. Why was DW5 not the purchaser? He certainly had more knowledge of the said lands and most probably had the means as well. But yet, a person in the form of the 2nd defendant, who had absolutely no interest in the properties and with suspected financial ability, jumped into the transaction. Could she be the used as a nominee for the DW5 or S.S.K. Sdn Bhd to cover up a money-lending arrangement rather than a purchase?
>
> This suspicion finds support in cheques issued by the plaintiff towards repayment of the loan by installment. They were either banked into the account of S.S.K. Sdn Bhd or cashed out by the 2nd defendant. This infers repayment of a loan by the plaintiff.

The evidence showed that the 2nd defendant bought the two lots of the said property when her father-in-law advised her to do so. As can be seen from the evidence, the father-in-law has a lot of friends in Sitiawan including the 1st defendant. After consulting his friends the father-in-law asked the 2nd defendant to buy the two lots. Apparently, the 2nd defendant trusted the advice given by her father-in-law and bought the two lots without even seeing the land. We find nothing adverse with that.

The learned judge had also doubted her ability to pay. We could not find any evidence to show that the 2nd defendant was not in a position to pay for the purchase of the two lots. The plaintiff did not seem to doubt her ability to pay and she was never cross-examined on her financial standing, neither was this raised as an issue. The evidence showed she was earning a salary of RM1,200 a month. Her husband happened to be the son of the major shareholder in a feedmeal company. She was not even asked as to the source of her funds. The fact remains that she paid the plaintiff the sum of RM120,000 for the purchase of the two lots and the plaintiff had acknowledged

receipt of this sum. We are of the view that it is highly improper and prejudicial for the learned judge to make adverse inferences on her ability to pay just to support his finding of fraud.

The learned judge did not stop there but also raised the issue as to why the 2nd defendant's father-in-law (DW5) himself did not buy the two lots. DW5 gave evidence at the trial but was never questioned as to why he himself did not purchase the two lots. As such, we are at a loss as to why the learned judge was perturbed when the plaintiff himself never raised such an issue. Further, the 2nd defendant's ability to pay was never raised in the pleadings.

The learned judge also raised the issue of cashing of cheques of the purported repayments by the 2nd defendant. The appellant claimed he had issued seventeen cheques purportedly to be repayments for the loans. On the other hand, the 1st defendant claimed that those cheques were payments for the balance of the amount still due to the enterprise from the plaintiff as shown in the account. The 1st defendant gave evidence that at the material time the plaintiff had taken goods from the enterprise amounting to more than RM1 million. He had pressed the plaintiff to settle the amount because the enterprise needed the money to survive. The plaintiff then gave the title deeds to the 1st defendant to find buyers for the said property. The 1st defendant succeeded in selling the said property for RM180,000. He admitted that the RM180,000 was paid to the enterprise. The plaintiff confirmed that the sum of RM180,000 was paid to the enterprise but denied that it was from the proceeds of sale of the said property and insisted it was monies loaned to the enterprise. With the RM180,000 there was still a substantial sum of money due to the enterprise. The plaintiff then handed the seventeen post-dated cheques as additional payments to the enterprise. Being post-dated cheques they could not be cashed at the bank or anywhere else. They would be accepted only by close friends or associated businessmen who are willing to take the risk. The undisputed evidence is that the enterprise used to get supplies from one S.S.K. Sdn Bhd. It could be that the 1st defendant paid for the goods with those post-dated cheques. That was how the cheques came into the hands of S.S.K. Sdn Bhd. As for the cheques finding their way in the hands of the 2nd defendant it could be that the 1st defendant cashed them with the 2nd defendant or it could be that the 2nd defendant was asked by DW5 to cash those cheques. In our view, it is not safe for the learned judge to make inferences in respect of those cheques.

*3. Third Ground*

In this the learned judge stated:

> 3. Thirdly, in the firm's account book there appears unusual entries of these monthly repayments by the plaintiff. Though the 1st defendant asserts that these were for repayment by the plaintiff for outstanding sums the plaintiff owed to the firm they were listed in the account books as "share of profit – Ling lu King". It they were repayment towards the firm by a creditor, then, like all other entries, should have stated as "sales of broilers", which is a true reflection of the situation insisted upon by the 1st defendant. Why such odd entries and such payments finding its way to S.S.K. Sdn Bhd and the 2nd defendant? It is more probable that such payments were towards repayment of a loan.

First of all, it is observed that the learned judge himself admitted that it is more probable and nothing else. Ling Iu King, as we understand it, is the 1st defendant. The enterprise is a partnership of three persons, namely: the plaintiff, the 1st defendant and a third person. The evidence showed that the plaintiff owed a substantial sum of money from the enterprise amounting to almost RM2 million. The 1st defendant also gave evidence as to how this amount was accumulated in that almost daily the plaintiff took about three lorry loads of goods without paying for them. The plaintiff did not deny this but merely disputed the amount to support it. The plaintiff himself admitted having gone through the accounts of the enterprise and found them to be in order. The amount that the plaintiff owed the enterprise was also shown in the accounts. At that time the enterprise was in serious financial difficulties because of the amount owing by the plaintiff which eventually led to it being wound-up. It could be that the 1st defendant treated the amount paid by the plaintiff to be the 1st defendant's share of profit and the amount being the balance that the plaintiff owed the enterprise would be the plaintiff's share of the profit since at that time the evidence showed that the balance due to the plaintiff was still large. It is noted that the amount included the sum of RM180,000 which the plaintiff did not dispute was paid to the enterprise. In the absence of any other evidence it is not proper for the learned judge to make any inferences.

What is more glaring is the fact that the 2nd and 3rd defendants have nothing to do with those entries. If the cheques were repayments of the loan as claimed by the plaintiff, how come the cheques were credited into the accounts of the enterprise? The plaintiff who had examined those entries did not raise any query in respect of them. If they were repayments of the purported loan, they should never be credited into the accounts of the enterprise. By right they should be handed over to the lenders and not credited into the accounts of the enterprise. This shows that the cheques were payments of the amount the plaintiff owed the enterprise.

*4. Fourth Ground*

The learned judge stated the fourth ground as follows:

> 4. Fourthly, the sale and purchase agreements had a clause for the payment of 10% deposit of the purchase price to the vendor. These, as admitted by all defendants, were never made. But why, if the transactions were that of an arm's length deal which the defendants' attempt to infer? The plaintiff may not have appeared in the Ipoh office of M/s Sri Ling to collect such payment (as claimed by the 3rd defendant) but DW6, their solicitor, could have sent it to Kuala Lumpur together with all relevant documents, to his brother, DW3, who purported to be the solicitor for the plaintiff. Such act was never carried out. This indicates a lack of formality towards this purported sale and purchase where, as the parties claim, they did not really know each other. In such a situation inference of a cover-up of a loan agreement is exceedingly strong.

The evidence did not support the finding of the learned judge. There was no evidence to show that DW3 was the solicitor acting for the plaintiff. The plaintiff himself denied that DW3 was his solicitor. The fact that DW3 collected fees seemed to influence the learned judge that DW3 was the solicitor for the plaintiff. Although DW3 admitted that he collected the fees from the plaintiff, it is not clear whether he collected the fees for himself or on behalf of his brother (DW6). The evidence showed that all the necessary documents were prepared by DW6 in his office in Ipoh. The plaintiff was supposed to execute those documents together with the 2nd and 3rd defendants, but for some reason the plaintiff did not turn up at DW6's office in Ipoh. The 2nd and 3rd defendants executed the documents in DW6's office in Ipoh. After the 2nd and 3rd defendants had executed those documents the 1st defendant instructed DW6 to send over those documents to DW3 who was practicing in Kuala Lumpur to get the signatures of the plaintiff since the plaintiff was staying somewhere in Kuala Lumpur and DW3 knew the plaintiff. The 1st defendant then informed the plaintiff to go to DW3's office to sign those documents which had been prepared by DW6. This evidence, in our view, did not establish the fact that DW3 was acting for the plaintiff. Fortified by the evidence of the plaintiff himself that DW3 was not his solicitor, we are of the view that the learned judge was in error in coming to the conclusion that DW3 was the solicitor for the plaintiff. The evidence showed that DW3 was taking instruction from DW6 to secure the signatures of the plaintiff. DW3 was asked by the learned judge whether he had collected fees from the plaintiff. DW3's reply was in the affirmative. There was no follow-up query as to whether the fees was for himself or on behalf of DW6. We have gone through the evidence and we could not find anywhere to show that the plaintiff had paid DW3 any fees.

Despite all that, the learned judge insisted that DW3 was the plaintiff's solicitor. The learned judge went on to deal with the payment of the 10% deposit. It is obvious that the learned judge did not peruse the evidence given by the witnesses. The evidence showed that when the plaintiff signed those documents in DW3's office which took place sometime in August (the evidence of the plaintiff himself) the full purchase price had been paid. The plaintiff stated he went to DW3's office to sign those documents in August 1998. The documents themselves showed the plaintiff signed those documents on 29 September 1998. The evidence showed that the full purchase price had been paid on 5 May 1998 as can be seen from the acknowledgments which the plaintiff did not deny. This fact was further confirmed by the plaintiff's evidence that he issued the repayment cheques, the first cheque bearing the date 14 May 1998 signifying that the plaintiff had received the RM180,000. The defendants claimed this RM180,000 was the full purchase price (denied by the plaintiff). Since the full purchase price had been paid on 5 May 1998, the issue of the 10% deposit would not arise anymore. In our view, that was the reason why the plaintiff did not raise the issue on deposit. Since DW3 was not the solicitor for the plaintiff and the fact that the full purchase price had been paid when the plaintiff signed those documents, the deposit was a non issue. In our view, the learned judge was in error in raising the issue on deposit.

*5. Fifth Ground*

The learned judge further stated as follows:

> 5. Fifthly, payment of the full purchase price in the form of cash before registration of transfer of the said lands, and being carried out in the absence of solicitor where one was already engaged, and no retention for any sum to safeguard real property gain tax is another dubiety. Such absence adds doubts to whether such purchase price was ever paid in May of 1998, as claimed by the defendants. Though there is in existence the two acknowledgments of receipts of the payments of the full purchase price but were these actually executed on the date where such payment was purported to be made? The style of the contents seems rather sophisticated for an ordinary clerk in poultry farm of the 1st defendant to formulate. With a dated affixed with a chop rather than written on this document it is highly improbable that such receipts were issued by the plaintiff on that date itself. More likely, they were among the documents signed by the plaintiff at DW3's office.

The above finding by the learned judge, in our view, is directly in conflict with ss. 91 and 94 of the Evidence Act. Bearing in mind that the plaintiff did not raise this issue at all, there is no evidence by the plaintiff that those documents were non-existent. The case for the plaintiff is that those documents were obtained by fraud, in that when he signed those documents he was under

the impression that those documents were in respect of loan transactions and not sale and purchase agreements. We will deal with this point later. The plaintiff did not deny the existence of those documents. The learned judge was in error when he expressed his doubt as to the existence of those documents. We have stated earlier that the plaintiff had accepted the money as stated in the acknowledgments. The only issue was whether it was a loan or the proceeds from the sale. The learned judge was in error in doubting the existence of the documents. He should have considered whether the acknowledgments were in respect of the purchase sum or a loan.

*6. Sixth Ground*

On the sixth ground, the learned judge stated as follows:

> 6. Sixthly is the positive assertion of the DW3, the purported solicitor of the plaintiff, who said that he personally explained the contents of the documents send by his brother for the plaintiff to sign and thereafter witnessing the plaintiff's signature affixed thereon. For his effort, DW3 said that he was paid. If DW3 was paid for his service as a solicitor for the plaintiff why did he not informed the plaintiff of the absence of the 10% deposit payment mentioned in the sale and purchase agreements? Surely his duty as a professional required him to protect his client's interest. He did not seem even to have made inquiries as to the requirement for the deposit of the documents of title, and the safe keeping of the memorandum of transfers after execution by the plaintiff before full payment of the balance of the purchase price. He seems to have taken a completely indifferent attitude towards this entire transaction which he owed a duty towards the plaintiff, a person whom he claims to have known fairly well. By such callous attitude, this court is suspicious of his testimony. Further, by his own admission, at the material time when the plaintiff executed on the documents, DW3 had only one clerk working for him. Could this be the clerk who witnessed the plaintiff's signature rather than DW3 personally?

We have stated earlier that there was no evidence to show that DW3 was the solicitor for the plaintiff. We are of the view that the learned judge was in error in faulting DW3 for not doing enough as solicitors and went on to explain the duties of a solicitor to his client. The fact remained that the plaintiff denied DW3 was his solicitor or was acting for him. The learned judge was in error when he tried to impose on the plaintiff that DW3 was his solicitor when the plaintiff refused to acknowledge DW3 as his solicitor. Relying on the evidence of the collection of fees, it could not be said that DW3 was negligent and the basis for fraud. At the most DW3 was failing in his duty as a solicitor and it could not be said he committed fraud or abetted in the committing of fraud.

In our view, the most telling in respect of the learned judge's finding that DW3 was the solicitor for the plaintiff was the denial by the plaintiff himself that DW3 was acting for him or that he had engaged DW3 as his solicitor. The premise of the finding the learned judge was totally destroyed by the plaintiff's denial. The plaintiff himself denied paying DW3. For that reason the finding of the learned judge on this ground was not supported by evidence. In fact it went contrary to evidence.

*7. Seventh Ground*

The learned judge stated the last ground as follows:

> 7. Seventhly, there is a material contradiction in the testimonies of the defendants' witnesses. This relates to whether the plaintiff was present when the 2nd defendant decided to buy the two pieces of the said lands. The 2nd defendant had categorically affirmed that she had never met the plaintiff until the time she paid the full purchase price in May 1998. But her father-in-law, the protagonist of this purchase said that she was present when the purchase price was agreed upon. This contradiction is relevant and material to firstly test the creditability of the witnesses since this case is a combat of two versions of claim. Secondly, whether there was truly an actual agreement reached in this purported transaction. With the contradiction, not only the veracity of these witnesses is in doubt but also the actual existence of an agreement between the parties for the sale of the said lands.

The issue of fraud in the present case is in respect of the sale and purchase agreements and the transfer forms. There was no denial from the plaintiff that he signed those documents. He did not deny the signatures on those documents were his. The existence of those documents was not denied. The plaintiff's case is that he did not know that the documents he signed were the sale and purchase agreements and the transfer forms. He claimed that when he signed those documents they were documents pertaining to loan transactions. He did not deny that he received the RM180,000 and he acknowledged receipt of the RM180,000. He did not challenge DW2's ability to get the RM120,000. The plaintiff claimed that the RM180,000 he received was a loan and not the proceeds from the sale of the said property. It is in this light that we have to see whether the contradictions were material or otherwise which led to the fraud.

The contradiction pointed out by the learned judge was in respect of the presence of the 2nd defendant during the first negotiation in respect of the sale which took place in DW5's shop premises, most probably in DW5's office. This took place when the plaintiff and the 1st defendant went to see DW5 and informed DW5 that the plaintiff was selling the said property. DW5

gave evidence that the 2nd defendant was there. The 2nd defendant denied that she was present during the negotiation. Her evidence was confirmed by the plaintiff. As such DW5 could be mistaken about the presence of DW2 during the negotiation. It is not disputed that she was somewhere within the vicinity because that was her working place. We are of the view that this contradiction is minor in nature and did not go to the root which is the sale and purchase agreements and the transfer forms. Such minor contradictions are bound to happen. This did not affect the evidence of the existence of those documents nor did it affect the fact that the plaintiff signed the documents, because as we have stated above, the plaintiff admitted to all. His claim was that he signed those documents thinking they were loan transactions.

**Conclusion**

In our view, the learned judge should, in applying the test of balance of probabilities, view the evidence in totality and not find faults with the evidence of one side and conclude that fraud has been committed by one side. The evidence of the plaintiff which impressed the learned judge was his claim of being illiterate. The plaintiff himself admitted that he was educated up to Form II English medium. Form II is a secondary level of education in English. At that level he would have a basic knowledge of English. The plaintiff in his evidence claimed that he had his own company with a business turnover of RM20 million where he was the sole shareholder. He also claimed that he had an overdraft with one of his banks. He also knew about application of loan from a bank when he said in evidence that to get a loan from a bank would take some time to process and that was why he did not apply for a bank loan. All this point to the fact that he was not as illiterate as he claimed to be. In our view, he knew the documents he signed were sale and purchase agreements, transfer forms and acknowledgments of receipt.

In addition, the plaintiff gave evidence that the said property were transferred to him by his mother barely a year before the purported sale. From this we could come to a safe conclusion that he knew about transfer forms. If it is true that his business turnover was RM20 million, we see no reason why the bank would not give him a loan or an overdraft of RM180,000.

The plaintiff's evidence in respect of getting a friendly loan appears to be a bit far-fetched. The plaintiff claimed that the loan he got was for RM180,000 payable by monthly instalments of RM3,600 over a period of fifty months. On calculation after fifty months the repayment would be exactly RM180,000. There is no additional figure of interest or added sum. On this evidence, we are of the view that no man in his right frame of mind would give such a loan where his money is tied up for more than four years without earning any benefit from it. We are of the view that the plaintiff's story is highly improbable.

The plaintiff also gave evidence that he handed the three title deeds to the 1st defendant to look for a loan when he claimed that the said property was so valuable and precious to him. Suffice for the plaintiff just to ask his friend, the 1st defendant, to look for a person who was willing to lend his money to him and that as security, the said property. Photostat copies of the titles would be sufficient. The evidence shows that when the plaintiff handed over the title deeds to the 1st defendant, it is more probable that the plaintiff asked the 1st defendant to look for a buyer/buyers to buy the said property.

The plaintiff gave evidence that he did not go to the bank to borrow because it would take some time for the bank to process the loan. We do not think that was the truth. From the time he handed the title deeds to the 1st defendant he took more than six months to sign those documents.

In respect of the value of the said property which the plaintiff claimed to be RM400,000, no valuation report was tendered by the plaintiff to support his claim. In our view, the learned judge was in error when he accepted that valuation as claimed. The burden is on the plaintiff to prove that the value of the said property was RM400,000. The plaintiff did not do that. If he had done so, the defendants were at liberty to rebut. Without the valuation report the plaintiff's evidence should not be accepted. We noted that the total area of the said property did not exceed six acres. Each piece is about two acres. There were only rubber trees growing on the land. The land was categorised as agriculture. There is no evidence to show that the status or category of land use had been changed. There is also no evidence to show that there was an application for conversion of land use. The said property can be referred to as a smallholding.

The learned judge relied strongly on the lodgment of lien holder's caveats. We feel that there is nothing illegal or out of the extraordinary to lodge lien holder's caveats. It is conceded that in normal circumstances private caveats are sufficient. In the present case, the evidence shows that the full purchase price had been paid before the sale and purchase agreements were executed by the plaintiff. It could be that DW6 was of the view that the best protection to the 2nd and 3rd defendants' interest would be to lodge lien holder's caveats instead of private caveats because the purchase monies had been paid in full. The evidence shows that DW6 lodged the lien holder's caveats without any instructions from the defendants, in particular from the 2nd and 3rd defendants. At the most that was a mistake made by DW6 but definitely not fraud.

On the balance of probabilities, we find the evidence of the defendants is more acceptable than the evidence of the plaintiff. It is also noted that the plaintiff's evidence was not corroborated by any other witness or documents. Thus, even on the balance of probabilities, we find the evidence of the defendants is more probable.

As we have stated earlier, the burden of proving fraud on the plaintiff is beyond reasonable doubt and not on a balance of probabilities. We could not find fraud being proved by the plaintiff beyond reasonable doubt or even on a balance of probabilities.

For the above reasons, the appeal is hereby allowed with costs here and below. The order of the learned judge is hereby set aside. The deposit is to be refunded.